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2002]

## Essay

### APPLYING THE *GOOD NEWS CLUB* DECISION IN A MANNER THAT MAINTAINS THE SEPARATION OF CHURCH AND STATE IN OUR SCHOOLS

JAMES L. UNDERWOOD\*

#### I. INTRODUCTION

THE church-state tightrope that public schools must walk has become narrower, buffeted by treacherous legal crosscurrents. In *Good News Club v. Milford Central School*,<sup>1</sup> the United States Supreme Court vindicated the right of religious organizations to have access to school-created limited public forums on a par with other groups. In so doing, it expanded a two decades-old line of cases that began in a university setting, progressed to secondary schools and culminated in grade schools.<sup>2</sup> *The Good News Club* decision has several unique features not found in earlier equal access

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1. 121 S. Ct. 2093 (2001).

2. This line of cases began with *Widmar v. Vincent*, 454 U.S. 263 (1981). When a university opened its facilities to a variety of student, faculty and staff meetings after class hours, it created a limited public forum from which religious groups could not be excluded. See *Widmar*, 454 U.S. at 275-77. Discrimination against religious groups violated their First Amendment freedom of speech rights. See *id.* at 267-77. Although implementing such an exclusion to avoid violating the Establishment Clause strictures against an intimate relation between church and state might be a compelling reason that could justify such discrimination, giving equal access to religious clubs would not violate the Establishment Clause because it would not have the purpose or effect of advancing religion, but would only add to the array of choices given students. Next came *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), which upheld the Equal Access Act, 20 U.S.C. § 4071(a) (1995), requiring public secondary schools that had created a "limited open forum" (activities periods for student-initiated extracurricular groups) to give equal access to school facilities without regard to the "religious, political, philosophical or other content" of the groups seeking to participate. 496 U.S. at 246-47. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), concluded that an adult community group, which discussed family issues from a religious perspective, was entitled to the same access to school facilities in the evening as other organizations. Most recently, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court found that university funding of student publications was the fiscal and metaphysical equivalent of a public forum and denial of a share in the funding to a religiously oriented publication violated its free speech rights.

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cases. Unlike *Widmar v. Vincent*<sup>3</sup> and *Board of Education of the Westside Community Schools v. Mergens*,<sup>4</sup> which involved student-initiated groups seeking access to college and high school facilities respectively, *Good News Club* involved an outside, adult-led group seeking to evangelize six- to twelve-year-old grade school students.<sup>5</sup> Moreover, unlike the adult-family-issues discussion group whose equal access to school facilities in the evening was vindicated in *Lamb's Chapel v. Center Moriches Union Free School*,<sup>6</sup> the Good News Club sought to meet on school premises immediately after the close of the regular school day.<sup>7</sup> These unique features meant that, as soon as the opinion was issued, alarm bells were rung by those concerned that schools would be turned into religious battlegrounds and small children would be subjected to hard-sell, intimidating evangelism.

For instance, Barry Lynn, director of the Americans United for Separation of Church and State, prophesied that "the court's ruling means aggressive fundamentalist evangelists have a new way to proselytize school kids."<sup>8</sup> A *New York Times* editorial expressed concern about the Court's seeming indifference to the pressure that non-conforming students might have to endure. It lamented, "[n]or is the majority troubled by the significant social pressure likely to be felt by young children to participate, and the prospect that students and parents who do not share the beliefs being taught will feel like outsiders in their own school."<sup>9</sup> By contrast, columnist George Will fairly purred with pleasure over the decision, noting that it "may have brought, for the religious, radiating ripples of good news."<sup>10</sup> Similarly, a *Wall Street Journal* commentator rejoiced that the "decision in *Good News* continues the trend away from the misguided suspicion of religious belief and expression that for too long distracted the court."<sup>11</sup>

In an earlier Article, I suggested that rather than official exercises such as group prayer, the proper role of religion in the public schools was as a competitor with other varieties of speech during school-created, non-curricular activities periods to which student-initiated religious clubs would be given access equal to that of other groups.<sup>12</sup> The Equal Access

3. 454 U.S. 263 (1981).

4. 496 U.S. 226 (1990).

5. See *Good News Club*, 121 S. Ct. at 2098.

6. 508 U.S. 384 (1993).

7. *Good News Club*, 121 S. Ct. at 2098. In his dissenting opinion, Justice Souter observed that "[a]lthough school is out at 2:56 p.m., *Good News* apparently requested use of the school beginning at 2:30 on Tuesdays 'during the school year,' so that instruction could begin promptly at 3:00." *Id.* at 2120 (Souter, J., dissenting).

8. Mark Helm, *The Supreme Court, Religious Club Can Meet at School*, THE STATE (Columbia, S.C.), June 12, 2001, at A4.

9. Editorial, *Proselytizing in the Schools*, N.Y. TIMES, June 12, 2001, at A32.

10. George F. Will, "*Good News*" from the Court, NEWSWEEK, June 25, 2001, at 96.

11. Richard W. Garnett, *A Supreme Court Ruling Bodes Well for School Vouchers*, WALL ST. J., June 13, 2001, at A20.

12. See James L. Underwood, *The Proper Role of Religion in the Public Schools: Equal Access Instead of Official Indoctrination*, 46 VILL. L. REV. 487, 540-46 (2001); see

Act<sup>13</sup> requires that all public secondary schools receiving federal funds admit religious clubs to any school-created limited open forums (activities periods), including use of meeting rooms on a par with other groups. The Equal Access Act, however, does not include elementary schools: therefore, my earlier Article suggested that the statute be amended to cover the lower grades with the proviso that parents, rather than the younger students, make the choice to initiate clubs and determine which, if any, club the child would attend.<sup>14</sup> Placing the choice in parental hands would deflect pressure from the students.<sup>15</sup> To avoid making the schools ideological battle grounds for fractious groups whose agendas might divert the schools from their educational goals, the Article suggested continuance of the Equal Access Act's existing approach that such clubs be organized and run by the students rather than churches or other outside groups, with the modification that parents could initiate and run the clubs in the lower grades.<sup>16</sup> Parents of students in the elementary grades would have a direct relationship to the school comparable to that of the high school students covered by the current Equal Access Act. Their goals would most often be to further the educational purposes of the school in order to benefit their children, whereas an outside organization—good though its motives may be—might be more interested in pursuing its own agenda. Granting religious clubs equal access would reduce the pressure on school boards to cave in to demands for officially sanctioned group religious observance at the schools. With equal access granted to religious student clubs, angry cries that religion has been banished from the public schools would lose their effectiveness in creating pressure for reintroducing officially sponsored religious exercises.<sup>17</sup>

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also Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 3 (1986) (concluding that "[p]roperly implemented equal access and moment-of-silence laws are strictly neutral toward religion").

13. Equal Access Act §§ 801 et seq., 20 U.S.C. §§ 4071 et seq. (1984).

14. See Underwood, *supra* note 12, at 493, 542-44; Equal Access Act, 20 U.S.C.S. § 4071(a) (2001) (providing for admission to secondary school's limited open, non-curricular forum on equal basis regardless of club's religious, political or philosophical viewpoint).

15. See Underwood, *supra* note 12, at 542; see also William H. Rooney & Don Sparks, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507-08 nn.42-43 (1983) (surveying psychological literature comparing ability of adolescents and younger children to resist peer pressure). But see Scott J. Wilkov, Note, *The Writing Is on the Wall: Equal Access Erodes the Establishment Clause*, 34 ARIZ. L. REV. 375, 393 (1992) (concluding that extending equal access to lower grades is unwise because immature students would be subjected to too much peer pressure).

16. See Underwood, *supra* note 12, at 544; see also 20 U.S.C.S. § 4071(c)(5) (2001) ("[N]onschool persons may not direct, conduct, control, or regularly attend activities of student groups.").

17. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-10 (2000) (finding that group prayers at school-sponsored events on school property pursuant to school policy are state action, even if authorized by student vote, and that such prayers violate constitutional doctrine of separation of church and state); see also

The *Good News Club* opinion goes much further than these proposals by extending the equal access doctrine to outside organizations whose goal is religious conversion rather than discussion, and goes further than the leading precedent, *Lamb's Chapel*, by extending the equal access to a period immediately after the close of the regular class day and to a situation where the audience would be grade school children rather than adults, or college or high school students as in *Widmar* and *Mergens*, respectively.<sup>18</sup> Even though the Supreme Court concluded that there was little chance that parents or students would perceive the grant of equal access to the Good News Club as state support of religion,<sup>19</sup> schools still must wrestle with the problem of how to comply with the decision without overwhelming an educational setting with a camp meeting atmosphere and without turning themselves from their main mission into a quarter-master corps for various civic and religious groups wishing to use their facilities. There are ways of doing this. These are described in Part III of this Essay. Before discussing them, though, more background is needed on the *Good News Club* opinions.

## II. THE *GOOD NEWS CLUB* OPINION: EXPANDING THE EQUAL ACCESS DOCTRINE TO MEETINGS CONDUCTED BY OUTSIDERS IN ELEMENTARY SCHOOLS

Milford Central School permitted community groups to use its buildings after class hours for educational, artistic, "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community."<sup>20</sup> School policy prohibited use of its facilities "for religious purposes."<sup>21</sup> The Good News Club asked permission to meet in the school cafeteria once a week at the close of the school day with six- to twelve-year-old children. The meetings would be led by Reverend Fournier, a local minister, and his wife; they were also parents of a seven-year-old girl, who was a member of the Club.<sup>22</sup> The meetings would involve praying, singing, memorization of *Bible* verses, the playing of Biblically based games, the telling of stories with religiously based morals and an invitation to accept Jesus as Savior for those who were not already

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Lee v. Weisman, 505 U.S. 577, 592 (1992) (striking down officially orchestrated graduation prayers, Court observed that "prayer exercises in public schools carry a particular risk of indirect coercion").

18. See generally *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (applying equal access principle to high school setting); *Widmar v. Vincent*, 454 U.S. 263 (1981) (applying equal access principle to college setting).

19. See *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2103-04 (2001).

20. *Id.* 121 S. Ct. at 2098.

21. *Id.*

22. See *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 504 (2d Cir. 2000), *rev'd*, 121 S. Ct. 2093 (2001). In an apparent effort to broaden the basis of equal access so that it would not extend only to the parents of current students, the Supreme Court made no reference to the fact that the Fourniers were the parents of a student.

Christians and a challenge to those who were Christians to ask for God's help in obeying His will.<sup>23</sup> Only children who had parental permission could attend.<sup>24</sup> The superintendent denied the request, concluding that the meetings were more like religious worship than discussion of social issues from a religious perspective. Thus, these meetings came under the prohibition of the use of school facilities for religious purposes.<sup>25</sup>

The Club, Ms. Fournier and her daughter filed suit in federal court alleging violation of their free speech and equal protection rights.<sup>26</sup> The Northern District of New York granted the school summary judgment,<sup>27</sup> and a divided panel of the Court of Appeals for the Second Circuit affirmed.<sup>28</sup> In reversing, the Supreme Court focused on two issues: (1) whether the school violated the plaintiffs' free speech rights by engaging in viewpoint discrimination, whereby it permitted other groups to use its facilities but excluded the Good News Club because of its religious orientation; and, if so, (2) could the viewpoint discrimination be justified as needed to avoid a violation of the First Amendment prohibition of state establishment of religion?<sup>29</sup> The Court concluded that the exclusion of the Good News Club was viewpoint discrimination and, because granting the club access would not violate the Establishment Clause, avoidance of such a violation could not be used to justify the school's discriminatory exclusion.<sup>30</sup>

In discussing the viewpoint discrimination issue, the Court first agreed with the stipulation of the parties that the school, by opening its facilities to community groups for such uses as education, art, community welfare, recreation and entertainment, had created a limited public forum.<sup>31</sup> A state may limit a forum to which it grants public access to certain subjects or types of speakers, but it may not use the speakers' viewpoint as a basis for discrimination.<sup>32</sup> The Milford school had limited its forum to certain subjects: education, art, recreation and matters relating to commu-

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23. See *Good News Club*, 121 S. Ct. at 2098. The invitation and challenge are emphasized in Justice Souter's dissent to show the proselytizing nature of the meetings. See *id.* at 2116 (Souter, J., dissenting).

24. See *id.* at 2104.

25. See *id.* at 2098.

26. See *id.*

27. See *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147, 161 (N.D.N.Y. 1998), *aff'd*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 121 S. Ct. 2093 (2001).

28. See *generally Good News Club*, 202 F.3d at 511.

29. See *Good News Club*, 121 S. Ct. at 2097 (finding school policy violated Club's free speech rights and could not be justified as needed to avoid an Establishment Clause violation); see *id.* at 2101 (finding that exclusion of Club was viewpoint discrimination). The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

30. See *Good News Club*, 121 S. Ct. at 2097.

31. See *id.* at 2100.

32. See *id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (finding that state may restrict forum to "certain groups or the discussion of certain topics" but cannot censor particular viewpoint)); see also

nity welfare, including the development of moral character in children.<sup>33</sup> The Good News Club meetings also concerned character development of children and were thus within the scope of the forum.<sup>34</sup> The Good News Club could not be excluded from the forum just because it taught morality from a religious perspective. The Court observed that “[w]hat matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty or patriotism by other associations to provide a foundation for their lessons.”<sup>35</sup> The Court saw no basis for distinguishing the viewpoint discrimination found unconstitutional in *Lamb’s Chapel*<sup>36</sup> and *Rosenberger v. Rector & Visitors of the University of Virginia*<sup>37</sup> from the treatment of Good News. Although the Club used overtly religious techniques in attacking character development problems, the Court saw “no reason to treat the Club’s use of religion as something other than a viewpoint merely because of any evangelical message it conveys.”<sup>38</sup>

Having found viewpoint discrimination against the Club, the Court then addressed the question of whether the discrimination was necessary to avoid an Establishment Clause violation that would arise from granting a religious group access to the limited public forum.<sup>39</sup> The Court conceded that in *Widmar* it had suggested that avoiding an Establishment Clause violation might be a compelling reason that would validate “content discrimination.”<sup>40</sup> Granting Good News access to the forum, however, would not violate the Establishment Clause and thus could provide no excuse for the discrimination.<sup>41</sup> Admission to the forum would be based on neutral criteria, neither favoring nor disfavoring religious groups.<sup>42</sup> Parents would make the decision of whether or not their chil-

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*Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (same).

33. See *Good News Club*, 121 S. Ct. at 2100-01. For example, a Boy Scout meeting focusing on character development could take place at the school.

34. See *id.* at 2101.

35. *Id.* at 2102.

36. See *Lamb’s Chapel*, 508 U.S. at 392-98 (striking down denial of school facilities to community group that discussed family issues from religious perspective when other groups were permitted to use facilities in addressing similar issues).

37. 515 U.S. 819 (1995). In *Rosenberger*, the University of Virginia created the fiscal and metaphysical equivalent of a limited public forum when it funded student periodicals from activities fees. Thus, its refusal to fund a student publication that discussed social issues from a religious perspective was invalid viewpoint discrimination. See *id.* at 837.

38. See *Good News Club*, 121 S. Ct. at 2102 n.4.

39. See *id.* at 2103.

40. See *id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)). However, the Court in *Good News Club* pointed out that it had never decided whether preventing an Establishment Clause violation would justify viewpoint discrimination rather than the mere exclusion of certain subjects. See *id.*

41. See *id.* at 2103, 2107.

42. See *id.* at 2104; see also *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (stressing importance of neutral allocation standards in determining whether gov-

dren could attend; therefore, the children would not be subjected to coercion.<sup>43</sup> The community would not view the meetings as school sponsored because they would take place after the regular school day; the Club would be only one of several groups using the facilities under neutral criteria; and any child, no matter what his or her religion, could attend if parental permission were granted.<sup>44</sup> The Court gave little weight to the possibility that impressionable children might misconstrue the grant of access to Good News as state endorsement of its beliefs.<sup>45</sup> Children were not likely to view the club meetings as state-conducted classes because they would not be in regular classrooms, and the age range of the children (six through twelve) would be wider than in the regular classes.<sup>46</sup> Even if such errors did occur, and in the Court's view they were not likely, to use such mistaken impressions as the basis of excluding the Club would be improper because it would be granting a kind of "modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."<sup>47</sup> The net result was that there was no threat of an Establishment Clause violation that would legitimate the viewpoint discrimination arising from the exclusion of Good News from the limited public forum.<sup>48</sup>

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ernmental aid to religious organizations violated Establishment Clause); *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (noting that it helps government aid program avoid having impermissible effect of advancing religion if "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion"). *See generally* *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 503 (4th Cir. 2001) (noting emphasis in *Good News Club* on neutrality of state aid program as major factor in determining whether it passes Establishment Clause scrutiny).

43. *See Good News Club*, 121 S. Ct. at 2104.

44. *See id.* at 2103-07. The Court argued that these facts made the case analogous to *Lamb's Chapel*, where the meetings were also after hours and the facilities were open to such a variety of groups that no message of endorsement of religion would be conveyed. *See id.* at 2103; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993). *Widmar* also held that any possibility of community perceptions that granting access to *Bible* clubs endorsed religion would be negated by the variety of other groups also given access. *See Widmar v. Vincent*, 454 U.S. 263, 272-74 & n.13 (1981).

45. *See Good News Club*, 121 S. Ct. at 2103-07.

46. *See id.* at 2106.

47. *Id.* The Court noted that the proper perspective for judging whether there was state endorsement was the "reasonable observer," not particular mistaken individuals. *See id.* (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment) (applying reasonable observer standard to determine whether allowing KKK display of cross in public forum would be endorsement of religion)).

48. *See id.* at 2107. In *Brown v. Gilmore*, 258 F.3d 265 (4th Cir.), *cert. denied*, 2001 WL 1056666 (2001), a panel of the Fourth Circuit, in ruling that a Virginia requirement that public schools observe a minute of silence each day did not violate the First Amendment, followed the *Good News Club* opinion's condemnation of having the propriety of an observance determined by a heckler's veto in the form of a student's "sincere but utterly mistaken perceptions of state endorsement of religion." *Id.* at 278 (citing *Good News Club*, 121 S. Ct. at 2106). During the Virginia "minute of silence," students can make an "individual choice" to "meditate,



Justice Scalia's concurring opinion focused on rebutting arguments that the Good News Club meetings went well beyond the discussion of social issues from a religious perspective, such as the meetings of the group whose equal access rights were upheld in *Lamb's Chapel*,<sup>49</sup> and instead involved proselytizing for new members, which would create a divisive atmosphere in the schools where quiet was needed to encourage a diverse population to concentrate on learning.<sup>50</sup> Scalia contended that "[a] priest has as much liberty to proselytize as a patriot."<sup>51</sup> Proselytization is a protected form of speech.<sup>52</sup> To Scalia, proselytization is merely the enthusiastic recruitment of members, and because other groups using school facilities were allowed to recruit members, such activity could not be the basis of excluding Good News.<sup>53</sup> To concerns that such evangelism would subject children to pressure tactics amounting to coercion, Scalia scoffed that they would only be subjected to "the compulsion of ideas—and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses."<sup>54</sup> Even though proselytization may sometimes be divisive—promoting disharmony and unrest where we seek calm—that is no reason to ban it.<sup>55</sup> Making his point as much with elaborate sarcasm as logic, Scalia pretended to "shudder" at the very possibility of speech being divisive.<sup>56</sup> But religious disputes that might produce only a delicious frisson

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pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice." *Id.* at 270 (quoting VA. CODE ANN. § 22.1-203 (Michie 2000)). The Fourth Circuit panel concluded that "the statute's use of the word 'pray,' in listing an unlimited range of mental activities that are authorized during the minute of silence, cannot by itself be a ground for finding the statute unconstitutional." *Id.* at 281-82.

49. *See generally Lamb's Chapel*, 508 U.S. 384 (finding family issues discussion group is entitled to equal access to school facilities after hours).

50. *See Good News Club*, 121 S. Ct. at 2107-11 (Scalia, J., concurring).

51. *Id.* at 2107. The issue here, however, is not whether a priest can proselytize. It is whether he can do so at a public elementary school immediately after classes.

52. *See id.* at 2107-11.

53. *See id.* at 2110.

54. *Id.* at 2107.

55. *See id.* at 2110 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-96 (1993) (noting that religious point of view cannot be stifled just because of concerns that it may produce "public unrest") and *Lynch v. Donnelly*, 465 U.S. 668, 684-85 (1984) (holding that "political divisiveness" alone is not enough to invalidate display of city-owned creche in privately owned downtown park)).

56. *See, e.g. id.* Justice Breyer also concurred. *Id.* at 2111-12 (Breyer, J., concurring). He noted that the government's neutrality policy towards religion is only one factor in determining its validity. *See id.* at 2111 (Breyer, J., concurring). Also significant is "whether a child, participating in the Good News Club's activities, could reasonably perceive the school's permission for the Club to use its facilities as an endorsement of religion." *Id.* Relevant to determining whether such endorsement would be perceived are factors such as the time of the meetings, the children's ages and the nature of the meetings. *See id.* There was insufficient evi-

in someone with Scalia's combative disposition might produce deep rancor in others.

Justice Stevens' dissent was more sympathetic to the school's concern about the potential divisiveness of the Good News Club's meetings. He noted that the school had opened its facilities for limited public uses, primarily educational and recreational, but not to all forms of religious use.<sup>57</sup> Use for religious purposes could take three forms: (1) discussion of social issues from a religious point of view; (2) worship; and (3) proselytization (recruiting children for Christianity).<sup>58</sup> Although even worship could not be excluded from a forum open to subjects in general, an agency could limit "the subject matter and speaker identity" admitted to a non-public forum if such limits were "reasonable in light of the purpose served by the forum and [were] viewpoint neutral."<sup>59</sup> Milford had limited its forum by allowing category-one uses (discussing social issues from a religious point of view), but excluding the other two religious uses. This could be done so long as the limitations were applied "in an even handed manner."<sup>60</sup> The Good News Club's meetings primarily involved proselytization ("religious exhortation") rather than discussion of social issues from a religious viewpoint as was involved in *Rosenberger*.<sup>61</sup> Such proselytizing could lead to rancorous disputes that were disruptive of the educational atmosphere, just as permitting recruiting by political or hate groups would bring the same result.<sup>62</sup> A school had a right to exclude uses that would jeopardize the neutrality it needed to maintain its credibility as an educator.<sup>63</sup>

dence on these factors to sustain a summary judgment for the school. *See id.* at 2112. The record needed to be amplified. *See id.*

57. *See id.* at 2112 (Stevens, J., dissenting).

58. *See id.*; *DeBoer v. Vill. of Oak Park*, No. 99-4153 & 99-4226, 2001 U.S. App. Lexis 20635, at \*29 (7th Cir. Sept. 20, 2001) (noting that it was not feasible to make constitutional distinction between "speech from a religious viewpoint and a religious prayer, instruction or worship").

59. *Good News Club*, 121 S. Ct. at 2113 (Stevens, J., dissenting) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (finding distinction among forum uses must be reasonable in light of purpose of forum and neutral with regard to viewpoint), and also citing *Greer v. Spock*, 424 U.S. 828, 836 (1976) (noting that an agency "has broad discretion to 'preserve the property under its control for the use to which it is lawfully dedicated'")).

60. *Id.* at 2114.

61. *See id.* at 2114 & n.3 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (vindicating equal access of religious student publication to university funding)).

62. *See id.* at 2113. He adopted Justice Frankfurter's statement from *Illinois ex rel. McCollum v. Board of Education of School District No. 71*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring), that "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools." *Good News Club*, 121 S. Ct. at 2114 (Stevens, J., dissenting).

63. *See id.* at 2113 (citing *Campbell v. St. Tammany Parish Sch. Bd.*, 231 F.3d 937, 942 (5th Cir. 2000) (noting school can open its forum to protected speech "without inviting political or religious activities presented in a form that would disserve its efforts to maintain neutrality")). The Supreme Court vacated and re-

Justice Souter's dissent pointed to two key elements of the Good News Club's meetings that distinguished them from the discussion of social issues from a religious viewpoint, such as that which the Court decided should be given equal access in *Lamb's Chapel*.<sup>64</sup> the meetings involved an *invitation* to the non-Christian children to accept Jesus as their Savior and a *challenge* to Christian children to ask God's help so that they would have the strength to do His will.<sup>65</sup> This made the Club's meetings proselytization, and perhaps worship, that went beyond the legitimate limits the school placed on its forum.<sup>66</sup>

Of most concern to Souter, however, was the fact that "the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school."<sup>67</sup> School was out at 2:56 p.m., and Good News' meetings would begin at 3 p.m.; however, the club wanted access by 2:30 p.m., presumably to prepare the room.<sup>68</sup> This "temporal and physical continuity" blurred the lines between the school's official classes and the Good News Club's meetings, making it more likely that the meetings would be perceived as state sponsored.<sup>69</sup> Souter pointed out that only four other outside groups met at the school, and none of these had asked for access immediately after the close of the school day.<sup>70</sup>

This meeting of the Club on school premises immediately after regular classes had a positive impact on attendance. When the Club met at a church, eight to ten children were present; but the number tripled when the meetings were held at the school under the preliminary injunction.<sup>71</sup> This increased attendance flowing from the physical and temporal proximity to regular classes is disturbing in that it shows a greater similarity of the *Good News Club* facts to *Illinois ex rel. McCollum v. Board of Education of School District No. 71*<sup>72</sup> than the majority is willing to admit.<sup>73</sup> Although the meetings are at the school immediately after classes rather than during the regular school day as in *McCollum*, the identity of place (both club and classes at the school) and the contiguity of regular classes and the meetings allow the club to take advantage of a unique state power: the compul-

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manded the *Campbell* decision for reconsideration in light of the *Good News Club* opinion. See 121 S. Ct. 2518 (2001).

64. See *id.* at 2116 (Souter, J., dissenting); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (finding equal access must be given to groups discussing family issues from religious viewpoint).

65. See *Good News Club*, 121 S. Ct. at 2116 (Souter, J., dissenting).

66. See *id.* at 2117 n.3.

67. *Id.* at 2120.

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.*

72. 333 U.S. 203 (1948).

73. See, e.g., *McCollum*, 333 U.S. 203 (striking down *Bible* classes held in public school during school day).

sion of school attendance. The *McCollum* Court stated: "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the State's compulsory public school machinery."<sup>74</sup> Attendance at Good News meetings is not compelled because parental permission is required,<sup>75</sup> but state compulsion has gathered the children in a pool into which Good News can tap if it acts quickly before they disperse.<sup>76</sup>

### III. SUGGESTIONS FOR COMPLYING WITH THE *GOOD NEWS CLUB* OPINION IN A MANNER THAT MAINTAINS THE SEPARATION OF CHURCH AND STATE

Despite the Supreme Court's recognition of the Club's equal access rights, school districts still may be concerned that the continuity of time and place between the regular classes and club meetings may create the appearance that the state sponsors the meetings, and the schools may be concerned about subjecting grade school children to aggressive recruiting techniques of a variety of organizations. Of course, schools are not obligated to create a limited public forum to begin with, but if they do, is there anything that can be done to address these concerns without violating the equal access doctrine? There is. The key point is that the *Good News Club* opinion requires equal access rather than meeting every demand a religious organization may make of a school system.<sup>77</sup> The gravamen of Milford's violation was "exclusion of the Club from use of the

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74. *Id.* at 212. Georgetown law professor Father Robert Drinan, in an article published after the arguments in *Good News Club*, but before the decision was handed down, expressed concern that an opinion granting equal access to the club would undermine *McCollum*. He concluded that "[s]uch a decision will reverse the thrust of the 1948 *McCollum* decision, which made it clear that students in public schools are not to be divided along the lines of their religious affiliation or the lack of any connection with religion." See Robert F. Drinan, *Supreme Court Considers Public School Use*, NAT'L CATH. REP., April 13, 2001, at 12.

75. See *Good News Club*, 121 S. Ct. at 2104 (noting parental permission necessary for children to attend meetings).

76. *But see* Culbertson v. Oakridge Sch. Dist. No. 76, 258 F.3d 1061, 1064 (9th Cir. 2001) (concluding that even though students go to school under compulsory school attendance laws, compulsion ends at close of school day and therefore a Good News Club meeting at school immediately after classes cannot be said to benefit from state coercion). State assistance of one form or another seemed to play a major role in the Club's meetings. The Second Circuit Court of Appeals pointed out that earlier the school provided bus transportation for some children to Reverend Fournier's church, where meetings were held previously, and when this practice ceased, the Club asked for permission to meet at the school. See *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 506 (2d Cir. 2000), *rev'd*, 121 S. Ct. 2093 (2001).

77. See *Good News Club*, 121 S. Ct. at 2100 (recognizing that forum may be limited to certain groups and topics).

school.”<sup>78</sup> Granting access, however, does not mean guaranteeing the Club a pool of students from which to recruit its members, so long as it is given the same opportunity to attract members as other organizations. The Court concluded that granting access to the Club immediately after classes would not violate the Establishment Clause.<sup>79</sup> This, however, is not the same as saying the Club has to be given access at that time. The time given to the Club must be on a par with that given to other organizations. It could not be given a time that creates artificial barriers for those who wish to attend or that places the Club at a competitive disadvantage with other organizations. It is well established that a government agency creating an open or limited public forum may impose reasonable time, place and manner restrictions that are content neutral.<sup>80</sup> The Court in *Good News Club* noted that the record did not show that the school had offered an alternate time to the Club, and that “[i]n any event, consistent with *Lamb’s Chapel* and *Widmar*, the school could not deny equal access to the Club for any time that is generally available for public use.”<sup>81</sup> This statement implies that the school, even if it has opened its facilities to the public, could declare certain times, such as immediately after the close of classes, when the school would not be available to outsiders so long as the rule is applied even handedly. This statement also implies that if this scheduling is done, reasonable alternative times should be afforded on a non-discriminatory basis. This, however, does not mean a time at which a pool of students is ready and waiting, so long as no other group is given such an advantageous time. Thus, the school could create a temporal *cor-don sanitaire* at which no meetings conducted by outside groups are permitted, but such groups are given reasonable alternate times. This would avoid outside groups taking advantage of the pool of students created by

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78. *Id.* at 2102.

79. *See id.* at 2103. The implication of the decision is that meeting anytime after class hours helps avoid an Establishment Clause violation, even if it is immediately after regular classes.

80. *See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (approving narrowly tailored content-neutral time, place, manner regulations, including park sound system regulation designed to abate excessive concert noise); *see also, e.g.,* *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983) (discussing various types of forums and declaring validity of content-neutral time, place and manner regulations); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981) (approving state fair regulation that limited leaflet distribution to assigned booths although religious groups wanted peripatetic distribution). In *Zorach v. Clauson*, the Court held that it was not a violation of the Establishment Clause for public schools to “accommodate their schedules” to facilitate an off-campus program of private religious instruction by releasing students so that they could attend. 343 U.S. 306, 315 (1952). This, however, is not the same as saying that a religious or other type of group has a right to dictate the schedule. This would seem to be especially true when the program moves on to public school property.

81. *Good News Club*, 121 S. Ct. at 2103-04 n.5 (discussing time as element of equal access doctrine).

the compulsory school attendance laws and negate any impression that the clubs are part of the state-sponsored curriculum.

Another possible refinement could be to schedule several activities at the same time so that students would have a choice and any implication of favoritism would be removed. If such a competitive forum is created, there would be less risk than otherwise in scheduling the meeting immediately after school, because an array of secular and religious choices dilutes both the aura of state endorsement and any lingering effects of the compulsory school attendance laws. Such a competitive forum does not ensure the dominance, or even success, of any particular group. Equal access does not mean dominant access. The Court finds no constitutional violation even if "only groups presenting a religious view point have opted to take advantage of the forum at a particular time."<sup>82</sup> This statement, however, implies that others could be scheduled at the same time, thus making the creation of a competitive forum possible, assuming all groups are treated equally. The purpose of a competitive forum should not be to subvert religious or any other groups. A purpose of inhibiting religion is as invalid as a purpose of advancing it.<sup>83</sup> The purpose of a competitive forum would not be anti-religious, but the secular purpose of giving students and their parents a range of extracurricular choices.<sup>84</sup> As Justice Holmes observed, subjecting one's ideas to the "competition of the market" is inherent in our First Amendment system.<sup>85</sup> Faith would not cower before competition. It needs no secular insurance policy.<sup>86</sup> As John Leland, an American minister and advocate of the separation of church and state, argued in 1791, when churches seek a legal shield to insulate themselves from competition "it is evident that they have something in their system that will not bear the light, and stand upon the basis of truth."<sup>87</sup> Nor should the government serve as a guarantor for religion. With its

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82. *Id.* at 2107 n.9.

83. See *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (noting that whether governmental act is for purpose of advancing or inhibiting religion continues to be important in determining whether there is Establishment Clause violation).

84. See *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248-49 (1986) (finding limited open forum in form of extracurricular period with religious and non-religious groups meeting at same time has secular purpose).

85. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (developing concept of marketplace of ideas as best method for ascertaining truth).

86. As James Madison argued in 1785 in his *Memorial and Remonstrance Against Religious Assessments*, too much dependence of religion upon the state "is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits." 5 THE FOUNDERS' CONSTITUTION 83 (Philip B. Kurland & Ralph Lerner eds., 1987).

87. JOHN LELAND, THE RIGHTS OF CONSCIENCE INALIENABLE, AND THEREFORE RELIGIOUS OPINIONS NOT COGNIZABLE BY LAW: OR THE HIGH-FLYING CHURCH-MAN, STRIPT OF HIS LEGAL ROBE APPEARS A YAHO 7 (1791). Leland was a leader in the fight to bring about disestablishment in Virginia, Connecticut and Massachusetts.

myriad responsibilities for the health, security and welfare of its citizens, government cannot afford to be diverted into the labyrinthian role of keeper of the faith. As John Locke put it bluntly, "the care of souls is not committed to the civil magistrate any more than to other men."<sup>88</sup> A government that pursues such a religious agenda becomes hardened to the secular needs of its constituents. Is Locke's attitude hostile to religion? No! It frees religion from the smothering embrace of the state so that it can grow more vigorously.

The school also could deter misconceptions of state sponsorship by issuing a disclaimer.<sup>89</sup> Such disclaimers, however, must be scrupulously neutral with no hint of favoring or punishing any particular organization or type of organization. Furthermore, any aura of state financial sponsorship can be avoided by charging a reasonable fee that is directly geared to the cost of providing the facilities to outside users, uniform to all such users, and not designed to deter use of the facilities.<sup>90</sup>

The *Good News Club* opinion should not be interpreted as holding more than it does. The decision requires equal access to a limited public forum consisting of school premises after class hours.<sup>91</sup> It does not impose any obligation to open regular school hours to outside organizations for uses such as promoting interest in religious or other meetings to be held later in the day. Conceivably, if other organizations were to be permitted to make promotional pitches during school hours for meetings to be held later, religious organizations could make a plausible argument

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See ANSON PHELPS STOKES AND LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 62-63 (1964, 1975 Reprint).

88. JOHN LOCKE, A LETTER CONCERNING TOLERATION 18 (1689) (Liberal Arts Press, 1950).

89. See *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (favorably mentioning disclaimer in student handbook as means of preventing erroneous impressions of state sponsorship); see also *Mergens*, 496 U.S. at 251 (noting that school can make clear to students that it does not endorse club).

90. The Supreme Court already has recognized that the *Good News Club* decision requires examination of fees charged for use of public facilities to ensure that there is no discrimination against religious organizations. See *Gentala v. Tucson*, No. 01-75, 2001 WL 872700 (U.S. Oct. 9, 2001), *vacating* 244 F.3d 1065 (9th Cir. 2001). The Ninth Circuit held that the city was justified on Establishment Clause grounds in refusing a request by local National Day of Prayer organizers, who had been granted permission to use a public park, that a city fund be used to defray charges for audio and lighting services provided by the city. The fund had been used to defray fees charged by the city to other organizations but the city refused the request by the National Day of Prayer organizers on the ground that such a direct contribution to religious groups would violate the Establishment Clause. The Supreme Court vacated the Ninth Circuit's approval of the City's action and remanded for reconsideration in light of *Good News Club*. Cf. *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 709 (4th Cir. 1994) (finding school board's rent discrimination against church violated its rights of free speech and free exercise of religion).

91. See *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2103 (2001) (observing that *Good News Club*, like *Lamb's Chapel*, involved use of school facilities "after school hours").

that the forum had been expanded and they should have equal access to make such announcements. However, this type of claim would have to contend with a well-established line of cases developed over a period of forty years that precludes school-sponsored religious observances, such as officially sanctioned prayer and *Bible* reading.<sup>92</sup> Such promotional messages made during the time when students are at school under compulsory attendance and when the official curriculum is being presented are more likely to be viewed as state-sponsored rather than private speech.<sup>93</sup>

The *Good News Club* opinion focuses on access to the forum. It does not require public employees to act as clerical agents for religious or other organizations. In *Culbertson v. Oakridge School District No. 76*,<sup>94</sup> a panel of the Ninth Circuit in an opinion by Judge John Noonan concluded that although an Oregon school district had committed viewpoint discrimination by excluding a Good News Club from its forum, an equal access remedy did not mean that teachers should be required "to distribute parental permission slips."<sup>95</sup> The court observed that:

[t]he requirement that teachers distribute the slips, however, goes beyond opening access to a limited public forum. It puts the teachers at the service of the club. Not just an empty classroom but the teacher's nod of encouragement is thereby afforded the club's religious program. The line between benevolent neutrality and endorsement is fine. Here it is overstepped.<sup>96</sup>

Forum users must assume the burdens of their own operation and not depend on the state as an administrative crutch. The opinion does not

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92. See generally *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating officially sanctioned prayer at high school football games as violating Establishment Clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down officially organized graduation prayer); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (finding that moment of silence for meditation had purpose of advancing religion); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (finding that *Bible* reading and Lord's Prayer recitation at beginning of school day violates Establishment Clause because it has purpose or effect of advancing religion even if there is opt-out provision); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that recitation of officially composed prayer in public schools violates Establishment Clause even with opt-out provision).

93. The Equal Access Act could not be used to justify such promotional messages in grade schools because it applies only to student-initiated groups in secondary schools, rather than meetings conducted by outside groups in grade schools. See generally *Equal Access Act*, 20 U.S.C.S. § 4071(a) (2001) (granting equal access to limited open forum to student groups regardless of their religious, philosophical or political views in secondary schools receiving federal funds); 20 U.S.C.S. § 4071(c)(5) (2001) (stating equal access does not apply to meetings conducted by "nonschool persons").

94. 258 F.3d 1061 (9th Cir. 2001).

95. *Culbertson*, 258 F.3d at 1063.

96. *Id.* at 1065.



require school districts to genuflect deeply to every demand by a religious group.

The *Good News Club* opinion does not compromise a school's ability to protect itself from disorder. The focus of the opinion is on preventing viewpoint discrimination.<sup>97</sup> Thus, equal access would have to be granted to groups whose views are unpalatable to the majority but not disruptive if the groups' use would fall within the reasonable limits placed by the school on the use of the forum. In *Tinker v. Des Moines Independent Community School District*,<sup>98</sup> the Court observed that:

[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.<sup>99</sup>

But conduct at the school that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of the freedom of speech."<sup>100</sup> To be disruptive, the speech would have to cause a greater disturbance than the emotional pressure created by proselytization.<sup>101</sup> But the *Tinker* material disruption standard probably would be met by violence, loud noises or any other conduct that interrupted the ability of teachers or students to concentrate on the learning process. Thus, for example, if an outside group in making use of a classroom immediately after the close of the schoolday, arrives early to arrange the premises and creates noise and confusion interfering with classes, the school would not have to tolerate such conduct under the aegis of equal access. Furthermore, a group that seeks to imbue the students with a gospel of violence could also be committing material disruption and very likely could be excluded from the forum.<sup>102</sup> It would be easy for the frightened imagination to conjure a gruesome parade of groups, each more loathsome than

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97. *Good News Club*, 121 S. Ct. at 2102.

98. 393 U.S. 503, 509 (1969).

99. *Id.* at 509. But see *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680-86 (1986) (affirming power of school officials to punish student for offensive sexual remarks in school assembly); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (deciding that since course-related newspaper was not a public forum, school official could delete articles referring to pregnancy and divorce since they were inconsistent with the school's educational mission); *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982) (deciding that school officials may not remove books from library based on the ideas they contain but may remove them based on vulgarity or lack of educational suitability of their contents).

100. *Tinker*, 393 U.S. at 513.

101. *Good News Club*, 121 S. Ct. at 2107 (Scalia, J., concurring).

102. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (concluding that although state could not forbid abstract advocacy or teaching of philosophy of violence, it could prohibit incitement to "imminent lawless action"); see also *Whitney v. California*, 274 U.S. 357 (1927) which was overruled by *Brandenburg* but included

its predecessors, gaining admission to a school's forum. The *Good News Club* opinion indeed does open the door generously. But there are limits.

The direct impact of the *Good News Club* case is to blur the line separating church and state. An indirect effect, probably unintended by the Court, could be to furnish an argument fortifying the line of separation between church and state against pressure to further its eradication. When the political tom-toms are beating their loudest,<sup>103</sup> claiming that religion has been banned from the public schools, and when in a dazzling display of *post hoc, ergo propter hoc* reasoning<sup>104</sup> everything from sun spots to crab grass is blamed on its absence, and school-sponsored religious observances are advocated as a curative, we can now say: "What ban? We've got equal access." Equal access can lead to student and parental choice rather than the pressure of official observances. In granting equal access to outside groups rather than just extending it to parentally run groups in elementary schools, the Court has gone further than my earlier recommendations.<sup>105</sup> But with proper time, place and manner limitations placed on use by outside groups, schools can avoid being turned into the scene of trench warfare between religious and other advocacy groups.

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a concurring opinion by Justice Brandeis which gave birth to the formulation used by the *Brandenburg* opinion. 274 U.S. at 376 (Brandeis, J., concurring).

103. See LELAND, *supra* note 87, at 6, where the author expresses concern that sometimes "the Christian religion has been made a stirrup to mount the steed of popularity."

104. According to BLACK'S LAW DICTIONARY, the phrase *post hoc* refers "to the fallacy of assuming causality from temporal sequence; confusing sequence with consequence." BLACK'S LAW DICTIONARY 1186 (7th ed. 1999).

105. See generally Underwood, *supra* note 12.

